Filed 3/26/19 Rosas v. Kensington Caterers CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROSA ROSAS et al., Plaintiffs, v. KENSINGTON CATERERS INC. et al., Defendants and Respondents; WILLIE McMULLEN, Claimant and Appellant.	B286505 (Los Angeles County Super. Ct. No. BC507797)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

Willie McMullen, in pro. per., for Claimant and Appellant.

Cruz & Del Valle, Leonard G. Cruz and Sonia H. Del Valle for Defendants and Respondents.

Claimant and appellant Willie McMullen (McMullen) was the assignee of default judgments entered against defendants and respondents Kensington Caterers, Inc. (Kensington) and Richard Mooney (Mooney) that were subsequently vacated. McMullen appeals an order denying his motion to vacate an order that directed him to return funds that he seized from Kensington's and Mooney's bank accounts. McMullen contends the trial court never acquired personal jurisdiction over him and therefore could not order him to return the funds to Kensington and Mooney. He also contends that during the pendency of the previous appeal, the trial court was divested of jurisdiction and therefore had no authority to grant leave to Kensington and Mooney to file a cross-complaint against him.

For the reasons discussed below, McMullen's jurisdictional arguments are meritless, and the order appealed from is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Earlier proceedings*.

On May 3, 2013, plaintiffs Rosa Rosas (Rosas) and Julio Casas (Casas) (not parties to this appeal) filed suit against Kensington and Mooney alleging, inter alia, wrongful termination in violation of public policy, as well as statutory claims under the Labor Code and under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). In September 2013, Rosas and Casas obtained entry of default as to both Kensington and Mooney. On March 19, 2015, the matter proceeded to a default prove-up hearing, and the trial court entered separate default judgments in favor of Casas and Rosas, against both Kensington and Mooney, awarding each plaintiff the sum of $250,585.

On March 26, 2015, Rosas and Casas assigned their judgments for purposes of collection to McMullen, who obtained writs of execution. On July 22, 2015, McMullen levied on $293,896 in accounts belonging to Kensington and Mooney. On October 7, 2015, McMullen assigned and transferred all rights, title and interest in the judgments back to Rosas and Casas.

On September 4, 2015, within six months of entry of the default judgments, Kensington and Mooney filed a motion under Code of Civil Procedure section 473 to set aside the entries of default, default judgments, and writs of execution.[1] They contended, inter alia, the default judgments were procured by a false affidavit of service, due process was violated because the judgments exceeded the amount demanded in the complaint, and the judgments were excessive.

McMullen joined in the opposition to Kensington's and Mooney's motion for relief from default. Specifically, McMullen filed written opposition to their motion for relief from default, contending that they had failed to present admissible evidence to support their claim that they were never personally served by the process server.

The matter was heard on November 24, 2015, and the trial court orally ruled it would grant the motion in its entirety. On December 18, 2015, the trial court entered a formal order vacating the entries of default and the default judgments, cancelling the abstract of judgment, recalling the writs of execution, and deeming Kensington's and Mooney's answer served as of November 24, 2015, the date of the hearing on the

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[1] All unspecified statutory references are to the Code of Civil Procedure.

motion. No appeal was taken by McMullen, Rosas or Casas from the December 18, 2015 order.

On December 3, 2015, Rosas and Casas filed a motion for reconsideration of the November 24, 2015 ruling. (§ 1008, subd. (a).) That motion was denied on February 9, 2016. On March 4, 2016, Rosas and Casas filed a notice of appeal that specified the appeal was from the February 9, 2016 order denying reconsideration.

As for Kensington and Mooney, on February 4, 2016, they filed a motion seeking an order compelling McMullen, as well as Rosas and Casas, and their attorneys, Donald Iwuchuku (Iwuchuku) and Metu Ogike (Ogike), to return property seized by Rosas and Casas or on their behalf pursuant to the void default judgments. Kensington and Mooney asserted that the failure of Rosas and Casas, their counsel, and their assignee, to return the funds they had wrongfully seized constituted the tort of conversion, as alleged in a proposed cross-complaint that they sought to file. McMullen was served with the motion for return of funds, but he did not file any opposition or appear at the hearing on the motion.

On March 2, 2016, the trial court heard the matter and granted the motion by Kensington and Mooney for return of the funds that had been seized pursuant to the default judgments. The March 2, 2016 order directed Rosas and Casas, their counsel, and McMullen to return all funds seized from Kensington and Mooney within 20 days. The trial court deferred ruling on a request by Kensington and Mooney for leave to file a cross-complaint for conversion. That same day, McMullen was served with notice of the trial court's ruling.

On March 16, 2016, Rosas and Casas filed a notice of appeal from the March 2, 2016 order. McMullen did not appeal that order.

2. *The decision on the prior appeal.*

In a nonpublished opinion (*Rosas v. Kensington Caterers, Inc.* (Apr. 14, 2017, B270721) [nonpub. opn.] (*Rosas I*)), this court held that because the notice of appeal filed by Rosas and Casas specified the nonappealable February 9, 2016 order denying reconsideration, rather than the December 18, 2015 order vacating the entry of defaults and default judgments, Rosas and Casas had failed to perfect an appeal from the order granting Kensington's and Mooney's motion to vacate.

As for the appeal by Rosas and Casas from the March 2, 2016 order directing *their counsel* to return the seized funds to Kensington and Mooney, this court determined that Rosas and Casas lacked standing to assert error on their attorneys' behalf, requiring dismissal of their appeal from the March 2, 2016 order that had been entered against Iwuchuku and Ogike.[2]

3. *Proceedings in the trial court during the pendency of the appeal.*

On April 12, 2016, during the pendency of the appeal in *Rosas I*, the trial court granted Kensington's and Mooney's request for leave to file a cross-complaint, and the cross-complaint was deemed filed as of that date. The cross-complaint, which was directed against Rosas, Casas, McMullen, Iwuchuku and Ogike, alleged the following causes of action: (1) conversion; and (2) a common count for money had and received/unjust enrichment, based on the cross-defendants' failure to return

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[2] Rosas's and Casas's appeal did not challenge the March 2, 2016 order insofar as it directed *them* to return the seized funds.

$259,209 of the seized funds after the default judgments were vacated. The cross-complaint alleged the cross-defendants had continued to withhold Kensington's and Mooney's funds without legal authority or justification.

On August 19, 2016, in ruling on a motion by Kensington and Mooney for an order lifting a stay of discovery, the trial court stated that all proceedings were stayed due to the pendency of *Rosas I*, the appeal by Rosas and Casas.

4. *Proceedings following the issuance of* Rosas I.

On April 14, 2017, this court issued its opinion in *Rosas I*, and the remittitur issued on June 14, 2017.

On August 24, 2017, McMullen filed the motion which is the focus of this appeal, a motion to vacate the following: (1) the March 2, 2016 order directing him to return property; (2) the April 12, 2016 order granting Kensington and Mooney leave to file the cross-complaint against him;[3] and (3) the summons for the cross-complaint, issued on April 19, 2016.

The motion to vacate was made on the following grounds: (1) the trial court lacked personal jurisdiction over McMullen on March 2, 2016 because he was not a party to the action, a summons had not been issued for him, and he had not been served with the summons and complaint; and (2) due to the pendency of the appeal in *Rosas I*, the trial court lacked subject matter jurisdiction to enter the order granting Kensington and Mooney leave to file their cross-complaint, and to issue a summons for the cross-complaint.

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[3] The motion to vacate erroneously stated the order granting leave to file the cross-complaint was entered on April 5, 2016. The discrepancy is immaterial.

Kensington and Mooney opposed the motion to vacate. They contended McMullen had submitted to the trial court's jurisdiction by making a general appearance, and therefore he could not challenge the trial court's jurisdiction. They asserted that McMullen "actively participated in opposing [their] *ex parte* application [for an order shortening time] as well as [their] motion to vacate the defaults and default judgments. McMullen appeared at the hearing on [their] *ex parte* application. McMullen filed evidentiary objections to [their] *ex parte* application as well as [to their] noticed motion. Moreover, McMullen filed three affidavits in opposition to [their] efforts to obtain relief from default judgments obtained by fraud. McMullen's participation in this action constitutes a general appearance and consent to the court's personal jurisdiction."

Kensington and Mooney further argued that during the pendency of *Rosas I*, which did not affect any issue relating to McMullen, the trial court was not divested of jurisdiction to enter an order allowing Kensington and Mooney to proceed with their cross-complaint against McMullen.

On September 29, 2017, after hearing the matter, the trial court denied McMullen's motion to vacate.

On October 11, 2017, McMullen filed a motion for reconsideration. (§ 1008, subd. (a).) On November 21, 2017, the trial court denied reconsideration, stating McMullen had failed to set forth any new facts or law that he could not have presented earlier.

On November 22, 2017, McMullen filed notice of appeal, specifying the appeal was taken from the September 29, 2017

order denying the motion to vacate and the November 21, 2017 order denying reconsideration.[4]

CONTENTIONS

McMullen contends the trial court erred in denying his motion to vacate, and that this court should direct the trial court to vacate all orders entered between the dates of November 24, 2015 (the date the trial court orally ruled it would vacate the default judgments entered against Kensington and Mooney) and April 19, 2016 (the date the trial court issued a summons for the cross-complaint).[5]

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[4] Although McMullen's notice of appeal specified both the September 29, 2017 order denying the motion to vacate and the November 21, 2017 order denying his motion for reconsideration, the ruling on the motion for reconsideration made pursuant to section 1008, subdivision (a), is *not* separately appealable. (§ 1008, subd. (g); *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 927–928, fn. 6.) Rather, said order is *reviewable* on the appeal from the underlying order denying the motion to vacate. (§ 1008, subd. (g).) However, the opening brief does not challenge the trial court's November 21, 2017 order denying reconsideration on the ground that McMullen had failed to set forth any new facts or law. Accordingly, the order denying reconsideration is outside the scope of the issues on appeal.

[5] In his reply brief, McMullen attempts to clarify that he "is not appealing [the] order vacating entries of default and default judgments. [He] is appealing the trial court's order denying [his] motion to vacate void orders[.]"

DISCUSSION

1. *No merit to McMullen's contention that the trial court erred in refusing to vacate the March 2, 2016 order directing him to return funds to Kensington and Mooney.*

a. *Appealability of the September 29, 2017 order denying the motion to vacate the March 2, 2016 order.*

The March 2, 2016 order directing Mooney to return funds that he seized from Kensington's and Mooney's bank accounts was effectively a final judgment on a collateral matter, separate and distinct from the merits of Rosas's and Casas's employment action against Kensington and Mooney. (*City of Colton v. Superior Court* (2012) 206 Cal.App.4th 751, 781 (*Colton*).) McMullen moved to vacate the March 2, 2016 order as void; the motion was denied. An appeal may be taken from an order denying a motion to vacate a void judgment, even if the judgment itself is not appealed. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 201, p. 278.) Therefore, the September 29, 2017 order, insofar as it denied McMullen's motion to vacate the March 2, 2016 order for return of funds, is appealable.

We now address the merits of McMullen's motion to vacate the March 2, 2016 order.

b. *Denial of motion to vacate was proper; no merit to McMullen's contention the trial court lacked personal jurisdiction over him on March 2, 2016, when it entered the order requiring him to return funds to Kensington and Mooney.*

McMullen moved to vacate the March 2, 2016 order on the ground the trial court lacked personal jurisdiction over him, and therefore its order directing him to return the funds to Kensington and Mooney was void. The trial court properly rejected that argument.

As indicated, on September 15, 2015, McMullen filed written opposition to the motion by Kensington and Mooney to set aside the default judgments that had been entered against them. In his papers, McMullen argued Kensington and Mooney had failed to establish that they were not duly served by the process server. By opposing the merits of Kensington's and Mooney's motion to vacate the default judgments, McMullen made a general appearance and thus waived any objection based on lack of personal jurisdiction.

The law on this point is clear. " 'A general appearance by a party is equivalent to personal service of summons on such party.' [Citations.] . . . . ' "A general appearance operates as a consent to jurisdiction of the person, dispensing with the requirement of service of process, and curing defects in service." . . . Section 1014 states, 'A defendant appears in an action when the defendant answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, . . . gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for the defendant.' The statutory list contained in section 1014 of what constitutes an appearance is not exclusive. A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed. [Citations.] If the defendant confines its participation in the action to objecting to lack of jurisdiction over the person, there is no general appearance. [Citations.] However, a party who seeks relief on any basis other than a motion to quash for lack of personal jurisdiction will be deemed to have made a general appearance and waived all objections to defects in service, process, or personal jurisdiction. [Citations.] The Courts of

Appeal have described the scope of actions in the litigation process which constitute a general appearance as follows: 'A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. [Citations.] 'If the defendant "raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general.' " ' " (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 52–53, italics omitted.)

These principles concerning acts constituting a general appearance are not limited to defendants who are named in the pleadings—they also apply to nonparties. For example, in *People v. Ciancio* (2003) 109 Cal.App.4th 175, a civil commitment proceeding, the State Department of Mental Health (DMH) contended it was not a party and therefore the trial court lacked personal jurisdiction over it. (*Id.* at p. 192) The reviewing court rejected the argument, stating: "[W]e conclude that DMH made a general appearance in response to the OSC, thus waiving any objection to the trial court's exercise of personal jurisdiction over it. DMH filed a response to the OSC in which it argued the merits of the motions, challenged the relief sought by the alleged [sexually violent predators], and expressly requested that the motions be denied on their merits. This constituted a general appearance, whether or not DMH was the real party in interest or otherwise a party to the proceedings. (See *In re Marriage of Lemen* (1980) 113 Cal.App.3d 769, 779 [nonparty witness who filed opposition to discovery motion objecting to jurisdiction, but also seeking other relief, made a general appearance]; *Howard v. Data Storage Associates, Inc.* (1981) 125 Cal.App.3d 689, 698–699

[in action for dissolution of corporation, nonparty individual director who filed a response to motion to surcharge and who participated in hearing made a general appearance in the action].)" (*People v. Ciancio*, *supra*, 109 Cal.App.4th at pp. 192–193; accord, *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1029 [a nonparty that is not named in the pleadings makes a general appearance and thereby submits to the court's personal jurisdiction by participating in the proceedings in a manner that recognizes the authority of the court to proceed, such as by seeking affirmative relief or opposing a motion on the merits]; see generally, Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2018) § 3:162, p. 3-55.)

Here, McMullen, who had not been named as a party, made a general appearance in September 2015 when he began participating in the action by filing opposition to Kensington's and Mooney's motion to set aside the default judgments. In doing so, McMullen recognized the authority of the court to proceed and thereby waived any objection based on lack of personal jurisdiction. Because McMullen had submitted to the trial court's jurisdiction, the court had jurisdiction to enter the March 2, 2016 order directing him to return the funds to Kensington and Mooney. Accordingly, McMullen's motion to vacate the March 2, 2016 order, which was predicated on the trial court's alleged lack of personal jurisdiction over him, was meritless and properly was denied.[6]

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[6] The fact that McMullen captioned his August 24, 2017 motion to vacate the order for return of funds as a special appearance does not negate the legal effect of his September 2015 general appearance in the matter.

2. *No merit to McMullen's contention that the trial court erred in refusing to vacate its order allowing the filing of the cross-complaint*.

As indicated, McMullen's motion to vacate also contended the trial court lacked jurisdiction in April 2016, during the pendency of *Rosas I*, to enter the order granting Kensington and Mooney leave to file their cross-complaint, and to issue a summons for the cross-complaint.

Again, the preliminary issue is appealability. Unlike the March 2, 2016 order directing return of the seized funds, the April 12, 2016 order granting Kensington and Mooney leave to file a cross-complaint was *not* a final judgment on a collateral matter. (*Colton*, *supra*, 206 Cal.App.4th at p. 781.) Rather, the April 12, 2016 order was merely an interlocutory ruling in the main action. Therefore, it does not appear that the September 29, 2017 order, insofar as it refused to vacate the April 12, 2016 order, is appealable.

Further, and in any event, there is no merit to McMullen's theory that the trial court was totally divested of jurisdiction during the pendency of *Rosas I*. Only a valid notice of appeal divests the trial court of jurisdiction. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) Conversely, "[a]n appeal from a nonappealable order does not divest the trial court of jurisdiction. [Citations.]" (*Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1431, fn. 6.) As set forth *ante*, this court held in *Rosas I* that because Rosas's and Casas's notice of appeal improperly specified the nonappealable February 9, 2016 order denying reconsideration, rather than the underlying order vacating the default judgments, Rosas and Casas had failed to perfect an appeal from the order granting Kensington's and Mooney's

motion to vacate. This court further held that Rosas and Casas lacked standing to appeal the March 2, 2016 order directing their counsel to return seized funds to Kensington and Mooney. Because Rosas and Casas had failed to bring a proper appeal, the pendency of *Rosas I* did not divest the trial court of jurisdiction.

Additionally, McMullen was not a party to Rosas's and Casas's appeal in *Rosas I*. Therefore, the pendency of *Rosas I* did not divest the trial court of jurisdiction to allow the filing of the cross-complaint against McMullen. (See *LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 876 [the pendency of an appeal "does not remove the trial court's jurisdiction to conduct litigation of claims outside the scope of that judgment, that is, involving other parties"].)

Accordingly, there is no merit to McMullen's contention that the order allowing Kensington and Mooney to proceed with their cross-complaint against McMullen should have been vacated as void.

DISPOSITION

The September 29, 2017 order denying McMullen's motion to vacate is affirmed. Kensington and Mooney shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.